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In the Supreme Court of the United States
October Term 1982

HOSPITALITY MOTOR INN, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Even assuming substantial evidence establishes that a company did not bargain in good faith with a union on other non-contested grounds, was the National Labor Relations Board nevertheless justified in basing a portion of its bad faith bargaining finding on the failure of the company to agree to a no-discrimination contract clause proposed by a union seeking an initial contract.

2. Further, concerning other contract proposals, was the National Labor Relations Board justified in basing a portion of its bad faith bargaining finding on the company's refusal to agree to union security or checkoff clauses.

TABLE OF CONTENTS

	Page
Questions Presented	1
Citations To Opinions Below	5
Jurisdiction	5
Statutory Provisions Involved	5
Statement Of The Case	6
Reasons For Granting This Writ	7
Conclusion	10
Appendix A (Decision and Dissenting Opinion Of The Court Of Appeals)	11
Appendix B (Decisions of the National Labor Relations Board)	14
Appendix C (Order Denying Petition For Rehearing)	53
Appendix D (Statutory Provisions)	54

TABLE OF AUTHORITIES

	Page
Cases:	
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	7
Atlas Metal Parts Co. vs. NLRB, 660 F. 2nd 304 (C.A. 7, 1981)	8
Chicago & North Western Railway Company v. United Transportation Union, 402 U.S. 570 (1971)	8
City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283 (1976)	9
Electrical Workers, IUE v. NLRB (Westinghouse Electrical Corporation & General Motors Corporation, Two Cases), 648 F. 2nd 18 (C.A., D.C., 1980)	7
Emporium Capwell Company v. Western Addition Community Organization, 420 U.S. 50 (1975)	7
Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971)	7
McDonnell Douglas Corporation v. Green, 411 U.S. 792, 800 (1973)	7
NLRB v. American National Insurance Company, 343 U.S. 395 (1952)	8
NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960)	12
H. K. Porter Company vs. NLRB, 397 U.S. 99 (1970)	8
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 *et. seq.*)	
Section 8(a)(1)	6, 12, 14, 27, 54
Section 8(a)(5)	6, 12, 14, 27, 54
Section 8(d)	8, 54

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hospitality Motor Inn, Inc.,[1] the Petitioner herein, and the Respondent below, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 5, 1983.[2]

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[1]Pursuant to Rule 28. 1 of the Rules of this Court, Petitioner states that Hospitality Motor Inn, Inc. is doing business as Harley Hotels, Inc., a wholly owned corporation of Helmsley Enterprises, Inc., a Delaware corporation, the parent company.

[2]The company filed a timely Petition for Rehearing which was denied by order of the Sixth Circuit on May 14, 1983. A copy of such order is reproduced herein as Appendix C.

CITATIONS TO OPINIONS BELOW

The opinion below by the United States Court of Appeals for the Sixth Circuit is reported in 667 F. 2nd 562 and a copy of such opinion is reproduced in this Petition as Appendix A hereto. In addition the opinions of the National Labor Relations Board, the administrative agency in the case, are appended to this Petition as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was included in its opinion filed January 8, 1982 (Appendix A, infra). A timely Petition for Rehearing was denied by the said Court of Appeals on May 14, 1982 (Appendix C, infra), and this Petition for Certiorari was filed within 90 days of that date in accordance with the requirements of 28 U.S.C. 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, et seq.). The relevant portions of said Act are reproduced in Appendix D hereto.

STATEMENT OF THE CASE

The National Labor Relations Board and the United States Court of Appeals for the Sixth Circuit have ruled that the company failed to bargain in good faith with the Hotel & Restaurant Employees and Bartenders Union, Local 235, herein called the union. After the union was certified by the Board as the collective bargaining representative for the company's bargaining unit employees at its Inn in Lansing, Michigan, the parties commenced bargaining for an initial contract in May, 1978. Although the parties met ten times and exchanged proposals and counterproposals, no agreement was reached and the last bargaining session was held January 19, 1979. The Board found that the company "had a fixed intent not to reach agreement respecting union security and dues checkoff and that the totality of its conduct—including, *inter alia*, its positions as to union security, checkoff, management rights, individual contracts and no-discrimination provisions also established that the company failed to bargain in good faith" (pages 14; 27, infra). The majority opinion of the Sixth Circuit ruled that the Board's finding that the company failed to bargain in good faith in violation of Sections 8(a)(1) and (5) of the Act was supported by substantial evidence (page 11, infra). For purposes of this Petition, the company is not contesting such overall bad faith bargaining finding.[3] However, the Court in its decision failed to directly address the issues the company is asking this Court to review—namely, whether substantial evidence supports the particular Board findings that the company's failure to grant a no-discrimination clause as well as the company's refusal to agree to a unilateral union security clause and a dues checkoff clause should be included as forming a part of the company's illegal refusal to bargain conduct.

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[3]The company before the Sixth Circuit did not contest another Board finding that it violated Section 8(a)(1) of the Act by promoting an employee to supervisor in an effort to curtail her union activities. Also, the company is not contesting in this Court the Board's bad faith finding respecting the individual contracts proposal and, for evidentiary reasons only, is not contesting the bad faith finding respecting the company's proposed managements rights clause.

REASONS FOR GRANTING THIS WRIT

A. The No-Discrimination Clause

The finding of the Board that the company was not bargaining in good faith by its refusal to grant a no-discrimination clause proposed by the union during collective bargaining for an initial contract is without precedent and, if allowed to stand, would force a party to subject itself to increased contractual liability without its willingness to do so voluntarily. By being forced to agree to include a no-discrimination clause a party would be risking additional liability, that of violation of contract, a libility it otherwise would not have. The cases *Electrical Workers, IUE* v. *NLRB (Westinghouse Electrical Corporation & General Motors Corporation.)* 648 F. 2nd 18, 24-25 (C.A., D.C., 1980) illustrate such additional contract liability. The Court there ruled antidiscrimination clauses in the collective bargaining contracts required the employers to supply a union with additional information which otherwise the employers might not have been legally obligated to supply.

It is realized that there are numerous laws and regulations seeking to eradicate discrimination in employment. Perhaps at the head of the list is Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*, as amended. This Court has emphasized that Title VII was enacted to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971).

Further, it is not disputed that bargaining over no-discrimination or antidiscrimination clauses are mandatory subjects for collective bargaining. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 64 (1975). Neither is it disputed that national labor policy embodies the principles of nondiscrimination as a matter of highest priority. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Nevertheless, there is no provision in the National Labor Relations Act that a party must be forced to add to its contractual obligations by including antidiscrimination contract

language unless voluntarily choosing to do so. It is submitted no finding of lack of good faith bargaining should be based on a party's refusal to agree to an antidiscrimination proposal. In fact, Section 8(d) of the Act in defining the obligation of the parties to bargain contains a proviso often quoted in refusal to bargain cases expressed in the following terms: ". . .such obligation does not compel either party to agree to a proposal or require the making of a concession. . ." In explanation this Court has stated in *Chicago & North Western Railway Company* v. *United Transportation Union*, 402 U.S. 570, 583, footnote 19 (1971):

> "Section 8(d) of the National Labor Relations Act, 29 U.S.C. Sec. 158(*d*), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith. See *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 30 LRRM 2147 (1952); *NLRB* v. *Insurance Agents' International*, 361 U.S. 477, 45 LRRM 2704 (1960)."

The holding in this case is contrary to the basic concept that good faith bargaining does not require the making of a concession as expressed in the proviso of Section 8(d) of the Act. Likewise, the majority opinion stands in conflict with the admonition expressed by this Court in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 ". . .allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based. . ."

B. Union Security and Dues Checkoff

The Sixth Circuit's majority opinion in subject case respecting the company's refusal to agree to a union security clause and the company's failure to agree to a checkoff clause stands in conflict with those cases such as *Atlas Metal Parts Co.* v. *NLRB*, 660 F. 2d 304, 308-09 (C.A. 7, 1981) holding that it is no refusal to bargain for a party to refuse to recede from an announced position. Although the company in subject case opposed union security for "philosophical" reasons the company also furnished another reason for its refusal to grant the checkoff, namely that compulsory union membership would discourage prospective

student employees attending college at Michigan State University who might not want to be required to join the union to work at the Inn (page 20, infra).

Concerning the company's refusal to grant a checkoff in subject case the Board apparently based its bad faith finding on the fact that because the company withheld money from employees paychecks for the United Fund and for saving bonds programs the company was refusing to bargain in good faith by not agreeing to a full checkoff of union dues. This Board finding was made in spite of the fact that the company counterproposed a modified checkoff by offering the union a time and a place, such as a table inside the Inn, where the union could collect dues from those employees who wanted to pay union dues. The union did not accept this offer and, although it promised to do so the union failed to submit any counteroffers to the company's modified checkoff proposal (page 22, infra).

In any event it is submitted simply because a company is more desirous of accommodating a charitable or savings bond drive than in accommodating a union by collecting its union dues through an automatic checkoff provision should be no justification for ruling that such company conduct constitutes an unfair labor practice. In this connection in a ruling involving a constitutional issue, this Court in *City of Charlotte* v. *Local 660, International Association of Firefighters*, 426 U.S. 283, 285 (1976) ruled that a city could refuse to grant its employees dues checkoff privileges even though it withheld money from the paychecks of its employees for various other purposes.

CONCLUSION

The company strongly contends that the issues presented by this Petition represent important questions of federal labor law and that the Court should grant the company's Peition.

Respectfully submitted,

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